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THE FLAG PROTECTION ACT OF 1989

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Mr. BIDEN, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S. 1338]

The Committee on the Judiciary, to which was referred the bill (S. 1338) to protect the physical integrity of the flag of the United States, having considered the same, reports favorably thereon and recommends that the bill do pass.

CONTENTS

	Page
I. Purpose	2
A. The flag of the United States is a unique symbol that serves a unique purpose	2
B. S. 1338 ensures that Congress exercises its power to protect the physical integrity of the flag in a manner that accords with *Texas* v. *Johnson*	4
II. Legislative history	6
III. Discussion	6
A. The decision in *Texas* v. *Johnson*	6
B. The Flag Protection Act of 1989 is constitutional	9
1. S. 1338 is content neutral and its application does not turn on communicative impact	9
2. There are significant and substantial differences between S. 1338 and the statute struck down in *Texas* v. *Johnson* and the *Johnson* case does not control the outcome of a challenge to the constitutionality of S. 1338	12
3. The Supreme Court's prior flag decisions strongly suggest that S. 1338 is constitutional	13
4. S. 1338 would pass constitutional muster	15
IV. Vote of the committee	15

29-010

S523-6

V. Text of S. 1338 16
VI. Section-by-section analysis 16
VII. Cost estimate 16
VIII. Regulatory impact statement 17
IX. Additional views of Senator Thurmond 18
X. Minority views of Senator Metzenbaum 19
XI. Minority views of Senator Hatch and Senator Grassley 22
XII. Minority views of Senator Humphrey 29
XIII. Changes in existing law 30

I. PURPOSE

A. THE FLAG OF THE UNITED STATES IS A UNIQUE SYMBOL THAT SERVES A UNIQUE PURPOSE

The purpose of S. 1338, The Flag Protection Act of 1989, is to protect the physical integrity of the American flag against mutilating, defacing, burning, trampling upon or maintaining on the floor or ground. The subject matter of this legislation is unique, as the American flag has an historic and intangible value unlike any other symbol. As John F. Heilman, National Legislative Director of the Disabled American Veterans, said when he testified at the hearings:

> The American flag—"Old Glory"—is our national ensign, a proud and courageous symbol of our Nation's precious heritage. As such, it has been carried and defended in battle, revered and cherished by its citizens and viewed as a beacon of hope and freedom by people throughout the world. (Written statement of John F. Heilman, Sept. 13, 1989, at 1.)

Throughout the more than 200 years of our history, the American flag has come to be the visible embodiment of our Nation. It was recognized as such by the Founders, who, following the Declaration of Independence, believed that we were in need of a flag to symbolize the young nation's unity and independence. On June 14, 1777, the Continental Congress adopted the following resolution:

> Resolved, that the flag of the United States be 13 stripes alternate red and white, that the Union be 13 stars white in a blue field representing a new constellation. (8 Journal of the Continental Congress 464.)

The unique place occupied by the flag in our national life was well described by Justice Holmes, who, in a history of Chief Justice John Marshall, said:

> The flag is but a bit of bunting to one who insists on prose. Yet, thanks to Marshall and the men of his generation—and for this above all we celebrate him and them—its red is our lifeblood, its stars our world, its blue our heaven. It owns our land. At will it throws away our lives. (Holmes, *John Marshall* (1901), in *Collected Legal Papers* 266, 270–71 (1920).)

It is the American flag that signifies our national presence in schools, public buildings, battleships and airplanes. It is the American flag that is mournfully draped over a fallen hero's casket and joyously flown over town squares on the Fourth of July. It was the

American flag that flew defiantly on the shoulders of the Marines who hoisted it at Iwo Jima on an unknown peak called Mount Suribachi. And it was the American flag carried to and placed on the Moon by the Apollo 15 astronauts, one of whom, Colonel James Irwin, said in his historic speech to a Joint Session of Congress: "The proudest moment in my life was when I saluted our American flag that we had planted on the plain at Hadley-Apennine [the moon]." (117 Cong. Rec. H31129 (daily ed. Sept. 9, 1971.)

The flag of the United States, then, is a unique symbol that serves a unique purpose. Today, in what is the most heterogeneous and diverse democracy in the world, the flag, in Chairman Biden's words, "pulls people together * * * [and] helps generate a kind of tolerance that is required in such a diverse society." (Opening statement of Chairman Biden, August 1, 1989, at 11.) While America's strength ultimately flows from our diversity, that same diversity also threatens to push us apart. We fear that which is different—but in the end, our common bond lies on our

> join[ing] in a social compact * * * and decid[ing] that the way we are going to govern ourselves is through a Constitution, the symbol of which is most significantly the flag; a Constitution whereby we have set out the rules by which we will all seek to realize our dreams and settle our differences. (Id at 10.)

As R. Jack Powell, executive director of the Paralyzed Veterans of America, forcefully articulated:

> Seventy-four years ago, President Woodrow Wilson said on Flag Day * * * "The flag is the embodiment not of sentiment but of history. It represents the experiences made by men and women who live under that flag. The flag is a symbol of all the rights and freedoms guaranteed under our Constitution. "* * * [T]here is a symbol, one symbol, which in standing for this great freedom for everyone of different opinions, different persuasions, different religious, and different backgrounds, society puts beyond the pale to tamper with. (Opening statement of R. Jack Powell, Sept. 13, 1989, at 72–73; emphasis added.)

The flag has stood as the unique and unalloyed symbol of the Nation for more than 200 years. In seeking to protect its physical integrity, Congress is simply ratifying the unique status conferred upon the flag by virtue of its historic function as the emblem of this Nation. Furthermore, in granting protection to the flag, S. 1338 does not seek to protect the flag as the embodiment of any single idea; indeed, the flag is worthy of protection not because it represents any one idea, but because it represents many ideas. As the testimony of every witness demonstrated, the flag represents different things to different people.[1]

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[1] S. 1338 is, therefore, readily distinguishable from a law, for example, that makes it a more serious offense to interrupt a patriotic speech than an unpatriotic speech. Such a law would presumptively violate the first amendment. S. 1338 is not of this character—it does not elevate any one view of what the flag represents but instead recognizes the diverse and powerfully held feelings of our citizens for the flag.

Congress's power to protect the physical integrity of the flag has never been questioned, and is consistent with its authority to protect symbols and landmarks. That power can properly be applied, moreover, even to those instances in which a person might seek to express an idea or convey a message through the destruction of the symbol or landmark. In the words of Laurence H. Tribe, Tyler Professor of Law at Harvard Law School: "The Court has repeatedly said that the power of government to protect things, whether for sentimental, or other reasons, whether they're symbols, or something else, is in no way limited by the fact that someone who wants to violate that protection has politics in mind." (Testimony of Laurence H. Tribe, Aug. 1, 1989, at 143.) The core principle is that in protecting those symbols or landmarks, the government cannot do so in a way that singles out or targets the message of whoever threatens it.

B. S. 1338 ENSURES THAT CONGRESS EXERCISES ITS POWER TO PROTECT THE PHYSICAL INTEGRITY OF THE FLAG IN A MANNER THAT ACCORDS WITH "TEXAS" V. "JOHNSON"

S. 1338 is consistent with the teachings of the Supreme Court in "*Texas* v. *Johnson,* 109 S. Ct. 2533 (1989), and elsewhere, that we can revere and protect the flag as long as we do not do so in a manner that singles out or targets the message of whoever threatens it. S. 1338 amends the existing Federal flag statute, 18 U.S.C. 700, to make it content-neutral: That is, the amended statute focuses solely and exclusively on the conduct of the actor, without regard to any message or idea he or she might be intending to convey, without regard to whether the actor intends to offend or cast contempt and without regard to the reaction of any observers of the conduct. Accordingly, S. 1338 serves the national interest in protecting the physical integrity of the flag in all circumstances.[2]

While the flag is a symbol, we have an interest in protecting it that is unrelated to the regulation of symbolic speech. As Chairman Biden said, summarizing his approach to S. 1338:

> [T]he flag in and of itself is viewed by many Americans as worthy of protection. * * * [The flag] is a symbol, but the fact that a message is attempt[ed] to be communicated or not communicated by its destruction is not the real reason why Americans want to protect it.
>
> They want to protect it because it is the flag, period, and not unlike they would want to protect something of value, and the message that is attached to why it is being destroyed is not very relevant to most Americans. The first instinct any American would have, it seems to me, when they walk around the corner and see a flag burning, is to grab a fire extinguisher to put it out. (Transcript of proceedings, Sept. 14, 1989, at 94.)

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[2] Of course, when a flag has become worn, torn or soiled through the normal course of usage and the passage of time, the governmental interest in protecting its physical integrity no longer applies. Such a flag is no longer a fitting emblem for display and may be disposed of by burning or other means. S. 1338 does not reach the disposal of such flags, which, since they are no longer fitting emblems for display, are in effect already destroyed.

Thus, the fact that S. 1338 is intended to protect the flag because of what it expresses and represents does not mean that the reason we seek its protection is to censor or suppress the person who might attack it. "The sentiment reflected in a law designed to protect a physical symbol may often be a sentiment of *sympathy* for what the symbol embodies and represents, not a sentiment of *censorship* of what the symbol-destroyer expresses." (Written statement of Laurence H. Tribe, August 1, 1989, at 5.) For those citizens who want to douse the flames of a burning flag, raise a flag off the ground or remove an unworn flag from the trash can without regard to why those flags were burned, dropped or discarded, there is a reason for protecting the flag—however differently each of us might articulate that reason—that has noting to do with the suppression of expression. When it comes to the American flag—that one symbol of the spirit of our democracy—we care more about protecting its physical integrity than about determining why its integrity has been threatened or who has thretened it.[3]

Commenting on the approach taken by S. 1338, Brady Williamson, lecturer in constitutional law at the Univesity of Wisconsin law School and a noted first amendment practitioner, said:

> I think that one of the statute's virtue which has not received a great deal of attention is that it has the potential to eliminate whatever hypocrisy there might be in this debate over the flag. * * * If we are really serious about protecting the flag as a national symbol, then we should be serious about preventing its desecration in all circumstances, not just in circumstances where the political message that some people might perceive is one that makes us uncomfortable, or one that we find despicable. (Testimony of Brady Williamson, Sept. 14, 1989, at 39–40.)

As Senator Kohl concluded:

> By enacting this measure, I believe that we would fulfill our obligation as guardians of the flag and as defenders of the Constitution, and we can do it now, quickly, effectively, and without the risk of weakening the constitutional

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[3] The theory advanced by William Barr, Assistant Attorney General, Office of Legal Counsel, Department of Justice—that whenever the Government chooses to protect something because of its symbolic value, the Government's interest is necessarily related to the suppression of expression and the regulation will be struck down (Testimony of William Barr, Aug. 1, 1989, at 70–71, 139)—proves too much.

For example, Assistant Attorney General Barr testified that it "would be unconstitutional under the Supreme Court's ruling" in *Johnson* for the legislature, as Chairman Biden put it, "to pass a bill saying that even if we had 10 million bald eagles, we want to protect bald eagles because they're a symbol of what America stands for." (Transcript of proceedings, Aug. 1, 1989, at 140–41.) As applied to "someone who was chopping the head off a bald eagle as a form of political protest," said Assistant Attorney General Barr, the law would be unconstitutonal. (*id.*)

Based on his expertise in the first amendment area, Geoffrey Stone, Dean of the University of Chicago Law School, said that he would be "hard pressed to explain why the Government could not constitutonally prohibit any person to kill a bald eagle because the bald eagle is the 'symbol' of the United States, wholly apart from the bald eagle's status as an endangered species." (Answer of Geoffrey Stone to written question 5 from Senator Grassley.)

Under Mr. Barr's theory, a host of other regulations would have to fall as well. For example, 18 U.S.C. 333, which makes it a crime to mutilate national bank obligations, would be unconstitutional as applied to a person who burns currency in symbolic protest of U.S. spending policies. A prohibition against desecrating gravesites at Arlington Cemetery would also be unconstitutonal as applied to someone who destroys a gravesite in protest of U.S. military policies.

principles for which the flag stands. (Opening statement of Senator Kohl, Aug. 1, 1989, at 42–43.)

II. Legislative History

The Supreme Court rendered its decision in *Texas* v. *Johnson* on June 21, 1989. On June 23, Chairman Biden offered an amendment (No. 232) to S. 5, the Act for Better Child Care, which would have amended the Federal flag statute, 18 U.S.C. 700(a). That amendment was adopted unanimously by voice vote.

On July 18, Chairman Biden, Senator Roth, and Senator Cohen, as principal sponsors, introduced S. 1338, The Flag Protection Act of 1989.

In accordance with a July 14, 1989 unanimous consent agreement, the Senate Judiciary Committee held 4 days of hearings on S. 1338 and on S.J. Res. 180, the joint resolution proposing a constitutional amendment. These hearings were held on August 1, August 14, September 13 and September 14, 1989.

The committee was fortunate to receive testimony from a broad range of constitutional scholars, constitutional historians, representatives of veterans' groups and individual veterans, as well as from members of the Senate and from the Department of Justice. The committee heard testimony from Senator Strom Thurmond; former Senator Charles McC. Mathias, Jr.; William P. Barr, Assistant Attorney General, Office of Legal Counsel, Department of Justice; Prof. Laurence H. Tribe; Charles J. Cooper; the Honorable Robert H. Bork; Dean Geoffrey R. Stone; the Honorable Erwin N. Griswold; the Honorable Louis H. Pollak; Prof. Stanley I. Kutler; Prof. Michael Parrish; Senator Robert Dole; Senator Alan Dixon; H.R. "Sparky" Gierke, on behalf of the American Legion; John F. Heilman, on behalf of the Disabled American Veterans; Walter G. Hogan, on behalf of the Veterans of Foreign Wars; R. Jack Powell, on behalf of the Paralyzed Veterans of America; Mary Stout, on behalf of the Vietnam Veterans of America; Gary Freeman; Col. Harry G. Summers; James H. Warner; Prof. Gordon Baldwin; Prof. Walter Dellinger; Prof. Brady Williamson; Prof. Eugene Hickok; and Prof. Stephen Presser. Prof. Forrest McDonald was also scheduled to testify, but was unable to attend.

Overall, the committee heard testimony from 26 witnesses during approximately 20 hours.

III. Discussion

A. THE DECISION IN TEXAS V. JOHNSON

It is important to address in some detail the precise terms of the Court's decision in *Texas* v. *Johnson*. A careful reading is necessary because, as Professor Williamson testified, the *Johnson* case "may prove to be the most discussed and the least precisely read." (Williamson testimony, at 14.)

The facts of the *Johnson* case can be briefly stated. During the Republican National Convention in Dallas in August 1984, Gregory Johnson participated in a series of demonstrations against the policies of the Reagan administration and the Republican Party. One such demonstration culminated with a rally at Dallas City Hall,

where Johnson unfurled an American flag, doused it with kerosene and set it on fire. While the flag burned, the protestors changed, "America, the red, white and blue, we spit on you." (*Johnson*, 109 S. Ct. at 2536.)

Johnson was subsequently arrested and charged with desecrating a venerated object in violation of Section 42.09 of the Texas Penal Code, which makes it a crime to "intentionally or knowingly desecrate" a "state or national flag." Importantly, "descreate" was defined under Texas law to mean "deface, damage, or otherwise physically mistreat" the flag in such a way "that the actor knows will seriously offend one or more persons likely to observe or discover this action." Id. at 2537, n. 1; emphasis added.)

Thus, under the Texas law at issue in *Johnson*, there could be no prosecution for physically mistreating the flag absent evidence of "serious offense." As Walter Dellinger, professor of law at Duke Law School, explained' "Texas did not make it a crime to burn or destroy the American flag. Texas prohibited actions affecting the flag if and only if those actions expressed an idea offensive to others." (Written statement of Walter Dellinger, Sept. 14, 1989, at 4.)

After a trial, Johnson was convicted, sentenced to one year in prison and fined $2,000. It was clear that "serious offense" had occurred, since a witness gathered the remains of the Flag burned by Johnson and buried them at his home. The Fifth District of Texas affirmed the conviction, *Johnson* v. *State*, 706 S.W. 2d 120 (1986), but the Texas Court of Criminal Appeals reversed. *Johnson* v. *State*, 755 S.W. 2d 92 (1988).

The U.S. Supreme Court affirmed and concluded, in a 5–4 decision, that Johnson's conviction under Section 42.09 of the Texas Penal Code violated the first amendment. Justice Brennan delivered the opinion of the Court, in which Justices Marshall, Blackmun, Scalia and Kennedy joined. Chief Justice Rehnquist filed a dissenting opinion, which was joined by Justices White and O'Connor. Justice Stevens filed a separate dissent.

Central to the reasoning of the majority opinion was the question of whether the Texas statute was related or unrelated to the suppression of expression. As Dean Stone underscored, "it is essential to recognize that the [*Johnson*] decision was premised upon * * * [this] critical distinction in first amendment doctrine." (Written statement of Geoffrey Stone, at 3.)

This distinction—between regulations that are related and unrelated to the suppression of expression—is derived in large part from the Supreme Court's decision in *United States* v. *O'Brien*, 391 U.S. 367 (1968). In *O'Brien*, the Court upheld a Federal statute prohibiting any person to forge, alter, knowingly destroy or knowingly mutilate a draft card as applied to a person who burned his draft card as an act of political protest. (*Id.* at 369–70.) Noting, in part, that the statute was designed to facilitate the administration of the selective service laws, that it did not turn in its application on whether the draft card was destroyed "for the purpose of expressing views" (id. at 365), and that it was "unrelated to the suppression of expression" (id. at 377), the Court found that the law was constitutional because it reasonably furthered a substantial governmental interest.

Elaborating on the distinction between laws that are "related to the suppression of free expression" and those that are "unrelated to the suppression of free expression," Dean Stone stated:

> A law is "related to the suppression of free expression" if it expressly restricts the communication of particular messages or if it restricts speech because of the reations of others to the content of the message conveyed. A law is "unrelated to the suppression of free expression" if it applies wholly without regard to the content of the message conveyed. (Stone written statement, at 3–4.)

In *Texas* v. *Johnson*, the majority concluded that the Texas statute was related to the suppression of free expression. In a key section of its opinion, the Court reasoned:

> The Texas law is thus not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offense to others. Texas concedes as much: "Section 42.09(b) reached only those severe acts of physical abuse of the flag carried out in a way likely to be offensive." (*Johnson*, 109 S. Ct at 2543; emphasis added; footnote omitted.)

As a result, "[w]hether Johnson's treatment of the flag violated Texas law thus depended on the likely communicative impact of his expressive conduct." (*Id.* at 2543; emphasis added.) In such circumstances, said the Court, "this restriction on Johnson's expression is content-based" (*Id.*)—meaning that his expression was restricted "because of the content of the message he conveyed." (*Id.*; emphasis added.) Since a "content-based" restriction was at issue, therefore, the Court applied " 'the most exacting scrutiny' " and concluded that Johnson's conviction could not be sustained. (Id.; citation omitted.) [4]

Thus, the decision in *Johnson* was expressly predicated on the determination that the Texas law was triggered by the offensiveness of the actor's conduct—it was, in other words, "related to the suppression of free expression." As Professor Tribe stated, "the State of Texas based Gregory Lee Johnson's conviction not on the simple fact that he had deliberately destroyed a still usable American flag * * * The State focused neither on his physical act, nor on any physical violence he might immediately provoke, but on the offensiveness of the message his act was likely to communicate." (Tribe statement, at 2.)

Put differently, the problem with the Texas statute was that it "defined desecration through the eyes of the beholder. * * * [The law's] greatest flaw * * * was that it punished the expression not of any point of view, but of only one point of view, defined as offensive by the beholder. It was not * * * content-neutral." (Williamson testimony, at 14.) *See also* written statement of Prof. Henry Monaghan, at 4 ("The Texas statute at issue permitted some to

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[4] In reaching its conclusion that "the most exacting scrutiny" must be applied, the Court specifically noted that "our inquiry is, of course, bounded by the particular facts of this case and by the statute under which Johnson was convicted." (*Johnson*, 109 S. Ct. at 2544, n.8; emphasis added.)

desecrate the flag and forbade others to do so, depending entirely on the audience's reaction to the speaker's message.")

As summarized by Chairman Biden:

> Did *Johnson* mean that there can be no statute that outlaws the burning of the flag, or did it say that only those statutes which require there to be an ingredient that the person intended to cast contempt and to offend others [were unconstitutional]? * * * If [the defense] could prove no one was offended by the burning, then there's no gravamen for the case under Texas law, and the Texas Attorney General acknowledged that, and the Court acknowledged that. * * * So let's make clear what * * * the decision said. The decision did not say that Gregory Johnson would have been found guilty had he silently walked up and burned the flag with no one else around. * * * That would not have even made him guilty under Texas law. * * * [U]nder Texas law, it wasn't sufficient just to burn a flag. (Transcript of proceedings, Sept. 13, 1989, at 111–12.)

As important as understanding what the Court did hold in *Johnson* is understanding what it did not hold. Several witnesses underscored this essential point. In Dean Stone's words: "The Court did not hold that there is an inviolable first amendment right to burn the American flag as a means of protest as such." (Testimony of Geoffrey Stone, Aug. 1, 1989, at 191.) And in the words of Professor Williamson: "The Supreme Court did not establish a new constitutional principle [and] it did not license flag burning." (Williamson testimony, at 14.) [5]

B. THE FLAG PROTECTION ACT OF 1989 IS CONSTITUTIONAL

1. S. 1338 is content-neutral and its application does not turn on communicative impact

As discussed above, the law at issue in *Texas* v. *Johnson* did not make it a crime to burn or otherwise destroy the American flag. Instead, the law prohibited such acts only if they were conducted in a manner that was offensive to others. Similarly, the existing Federal statute, 18 U.S.C. 700, does not make it a crime to burn or destroy the flag. Rather, the current law makes it a crime for anyone to "knowingly cast[s] contempt" upon a flag of the United States by "publicly mutilating, defacing, defiling, burning or trampling upon" it.

Pursuant to the terms of the majority opinion in *Johnson*, the fatal flaw in the Texas statute as well as in the existing Federal statute is that the commission of the crime is inextricably linked to

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[5] One example offered by Dean Stone illustrates the narrowness of the Court's ruling in *Johnson*:

> Consider the situation of an individual who is convicted of burning an American flag in public as a means of political protest in violation of a city ordinance prohibiting any person to make an open fire in a public place. Although *Johnson* invalidated the Texas flag desecration statute, it tells us little, if anything, about the constitutionality of this conviction, for unlike the Texas statute, our hypothetical open fires ordinance does not turn on communicative impact, is unrelated to the suppression of free expression, is not content-based and need not be subjected to "the most exacting scrutiny." In short, the constitutionality of the open fires law is simply not governed by *Johnson*. (Stone written statement, at 6.)

the communication of an idea. Under Texas law, the gravamen of the violation was "serious offense;" under current Federal law, the gravamen of the violation is "cast[ing] contempt." Both laws are content-based, both would be subject to "the most exacting scrutiny" by the Court and both conflict with the first amendment.

S. 1338 stands in direct contrast to both the Texas law and existing Federal law. It would amend Section 700 of Title 18 to read as follows:

> Whoever knowingly mutilates, defaces, burns, maintains on the floor or ground or tramples upon any flag of the United States shall be fined not more than $1,000 or imprisoned for not more than 1 year, or both.

As amended, the Federal flag law would no longer require the actor to have "cast contempt" or, for that matter, to have acted "publicly." Prosecution under the amended law would not in any way depend on the reaction of observers to the conduct. Put simply, commission of the crime would not be linked to the communication of any idea—indeed, the statute would apply regardless of whether the actor intends to communicate an idea. Operation of S. 1338, therefore, does not depend on whether a flag is being burned or otherwise destroyed for communicative or non-communicative purposes, or upon whether any particular person or persons might applaud or oppose the actor's conduct.

Thus, unlike the law struck down in *Texas* v. *Johnson*—which was content-based—S. 1338 is content-neutral. Unlike the law struck down in *Texas* v. *Johnson*, whether one's treatment of the flag violates the amended Federal law would not depend on the likely communicative impact of the conduct. And unlike the law struck down in *Texas* v. *Johnson*, the amended Federal law is in fact "aimed at protecting the physical integrity of the flag in all circumstances." [6]

Converting the existing content-based Federal flag statute into a content-neutral statute accords with the reasoning of the Supreme Court's decision in *Schacht* v. *United States*, 398 U.S. 58 (1970). After wearing an army uniform in a street skit protesting American involvement in the Vietnam War, Schacht was convicted of violating 18 U.S.C. 702, which forbids unauthorized wearing of the uniform of the armed forces of the United States. Schacht defended himself on the basis of 10 U.S.C. 772(f), which provided that "[w]hile portraying a member of the Army, Navy, Air Force or

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[6] There is another difference as well between S. 1338 and the law struck down in *Texas* v. *Johnson*. A court reviewing a challenge to the constitutionality of S. 1338 would not, as the administration argued, apply "strict scrutiny." As Dean Stone stated:

> I do not agree with Mr. Barr that the Court "will necessarily apply strict scrutiny" to [S. 1338]. First . . ., the proposed legislation poses a very different question than the Texas statute invalidated in *Johnson*. Unlike the Texas statute, the proposed legislation is content-neutral, does not turn on "communicative impact," is "unrelated to the suppression of free expression," and does not trigger the "bedrock" first amendment principle that government may not prohibit the expression of an idea because it is offensive to others. In short, the invocation of strict scrutiny in *Johnson* was based on factors that simply are not present in [S. 1338]. (Answer of Geoffrey Stone to written question (3)(a) from Chairman Biden.)

The same view was expressed by Professor Dellinger, who commented that "I think it is not at all necessarily the case that the Court would apply strict scrutiny . . ." (Testimony of Walter Dellinger, Sept. 14, 1989, at 48.)

Marine Corps, an actor in a theatrical or motion-picture production may wear the uniform of that armed force *if the portrayal does not tend to discredit the armed force.*. (398 U.S. at 61; emphasis added.)

The Court struck down the conviction because by allowing Schacht to participate in a skit that praised the Army but precluding him from participating if he criticized the Army, the statute violated the first amendment. (Id. at 63.) Important for purposes of S. 1338, the Court indicated that a blanket prohibition on the unauthorized wearing of a uniform—that is, a content-neutral restriction—would have been valid. (Id. at 61.)

When Chairman Biden asked Professor Dellinger about the relevancy to S. 1338 of the Court's reasoning in *Schacht*, Professor Dellinger responded:

> I think that is one of the strongest analogies in defense of the kind of statutory proposal you have made * * *. The Court goes to such trouble in *Schacht* to find the particular flaw in the statute * * * so as to indicate that * * * Congress could come back and say you cannot use the U.S. military uniform in any production, no matter whether it is praiseworthy or blameworthy. (Dellinger testimony, at 56.)

Just as Congress could have responded to the *Schacht* decision with a blanket, content-neutral ban on the unauthorized wearing of military uniforms of the United States, so, too, can Congress respond to *Texas* v. *Johnson* with a blanket, content-neutral ban on destroying the flag of the United States. Indeed, as Congress has done previously in response to Supreme Court decisions, see, e.g., *Bowsher* v. *Synar*, 106 S. Ct. 3181 (1986); *Buckely* v. *Valeo*, 424 U.S. 1 (1976), S. 1338 represents a good-faith effort to remedy a defect found in a statute.

Several witnesses left no doubt that they believe S. 1338 is constitutionally proper and legitimate means of responding to the Court's decision in *Johnson*. As Prof. Gordon Baldwin of the University of Wisconsin Law School put it: "When a defect is found in a statute, the Court invites repair * * * I think the flag decision is a quintessential example * * *." (Testimony of Gordon Baldwin, Sept. 14, 1989, at 57.) This same theme was echoed by Professor Tribe, who said: "Carefully removing a statutory defect identified by the Court in no way overrules or defies the Supreme Court's constitutional determination or usurps the Court's role as constitutional arbiter." (Tribe written statement, at 7.) Indeed, S. 1338 takes that role seriously. As Professor Dellinger explained:

> Congress is free to correct any flaw that may have rendered an Act of Congress unconstitutional, in response to a Supreme Court decision. That does not in any way abridge *Marbury* v. *Madison*. Indeed, where Congress responds to a decision of the Supreme Court that points out a flaw in a statute by removing that flaw, it is acting very much in accordance with the direction the Court has indicated and we have seen examples of this in recent years. (Dellinger testimony, at 19.)

2. There are significant and substantial differences between S. 1338 and the statute struck down in Texas" v. "Johnson", and the *"Johnson"* case does not control the outcome of a challenge to the constitutionality of S. 1338.

There are substantial differences between S. 1338 and the statute struck down in *Texas* v. *Johnson.* Dean Stone, for example, concluded in forceful terms:

> Unlike the Texas law invalidated in *Johnson* [S. 1338] does not turn on the communicative impact of the prohibited conduct, it is not content-based, it is not directly related to the suppression of free expression, and its constitutionality is thus not controlled by the principles that * * * dictated the outcome of *Johnson.* (Stone written statement at 8.)

The same conclusion was echoed by Professor Dellinger:

> The proposed Federal statute * * * eliminates the particular constituional flaw that was the basis for the Court's decision in *Texas* v. *Johnson* by changing the Federal statute from one that punishes the expression of a "contemptuous" idea to one that simply protects all flags against destruction without regard to the idea being communicated, and without regard to whether there is even an idea being communicated at all. * * * (Dellinger written statement, at 4.)

And in response to Senator Kohl's question about how he would defend S. 1338 in a court challenge, Professor Williamson said that he would emphasize the:

> substantial, substantial differences between the Biden statute and the Texas statute invalidated in *Texas* v. *Johnson.* * * * *[T]he legislation before this committee does not punish speech as such, it does not make criminal conduct dependent on the eye of the beholder, it is content-neutral and it protects the physical integrity of the flag in every circumstance. (Williamson testimony, at 39; see also joint written statement of Gordon Baldwin and Brady Williamson, at 19.)*

Significantly, in an exchange between Chairman Biden and Charles Cooper, who testified against S. 1338, Mr. Cooper agreed that the *Johnson* decision does not of its own force dictate the outcome of a challenge to the constitutionality of a content-neutral statute:

> Chairman BIDEN. The Court * * * never directly addressed the issue as to whether or not a "content-neutral" statute, or a provision that said it is just plain wrong to burn the flag, period, * * * was constitutional or not?
> tional or not?
> Mr. COOPER. Well, I will concede that point, yes, sir. (Testimony of Charles Cooper, Aug. 1, 1989, at 217.)

The *Johnson* decision, therefore, would not control the outcome of a challenge to the constitutionality of S. 1338.

3. The Supreme Court's prior flag decisions strongly suggest that S. 1338 is constitutional

The Supreme Court has never decided the constitutionality of a statute, like S. 1338, that protects the physical integrity of the flag in all circumstances. As noted above, the majority opinion in *Johnson* suggests that such a statute would be constitutional. In addition, the Court's opinions in its previous flag destruction cases also strongly suggest that it would uphold such a statute.

For example, in the majority opinion in *Johnson* itself, Justice Brennan favorably cited Justice Blackmun's dissenting opinion in *Smith* v. *Goguen,* 415 U.S. 566 (1974). (*See Texas* v. *Johnson,* 109 S. Ct. at 2543, n.6.) the majority in *Smith* reversed Goguen's conviction for wearing a small U.S. flag sewn into the seat of his pants in violation of Massachusett's flag destruction statute. Dissenting, Justice Blackmun interpreted the lower court's opinion as ruling out the possibility that Goguen was convicted on the basis of any "communicative element." (415 U.S. at 590 (Blackmun, J., dissenting).) On that basis, Justice Blackmun concluded that "Goguen's punishment *was constitutionally permissible for harming the physical integrity of the flag.* * * *" (Id.; emphasis added.)

As Professor Dellinger testified, "the majority opinion in *Texas* v. *Johnson* accommodated Justice Blackmun's view by emphasizing that Johnson was convicted under a statute that made his criminality turn on the communicative impact of his message," (Dellinger written statement, at 3), and by expressly contrasting his interpretation of the statute in *Smith* v. *Goguen* as one that "protect[ed the] physical integrity of the flag in all circumstances." (*Texas* v. *Johnson* , 109 S. Ct. at 2543, n.6.)

Justice Blackmun's dissent in *Smith* v. *Goguen*—predicted on his view that the conviction could be sustained because it was based on harming the physical integrity of the flag only and not on any "communicative element"—and his joining the majority opinion in *Texas* v. *Johnson*—predicated on the fact that the conviction, because it was tied to "serious offense," turned on a "communicative element"—illustrate the distinction between content-neutral and content-based flag statutes. Commenting on this distinction, Professor Tribe stated:

> That evidently remains not only Justice Blackmun's view, as indicated by the favorable citation to his *Smith* v. *Goguen* opinion in footnote 6 of the *Texas* v. *Johnson* majority (for which Justice Blackmun provided the crucial fifth vote), but also the authoritative Supreme Court view of the meaning of that seat-of-the-pants case.
>
> Specifically, the current majority reads that prior case as standing for the proposition that, insofar as someone is prosecuted only for damaging the physical integrity of the American flag, that prosecution is not barred by the first amendment—but, insofar as someone is instead prosecuted for the message he communicates by what he does with the flag, that prosecution is so barred. * * * Justice Blackmun's votes in those cases strongly suggest that, in a case challenging the constitutionality of [S. 1338], Justice Blackmun would be with the majority to uphold the legislation.

(Answer of Laurence H. Tribe to written question (2)(a) from Chairman Biden.)

The other principal Supreme Court cases on this subject also suggest that the critical question is whether a majority of the Court determines that the conviction under the statute at issue was predicated on the communication of an idea or solely on the physical act of burning or destroying a flag.

In *Street* v. *New York,* 394 U.S. 576 (1969), for example, Street, upon learning of the shooting of civil rights leader James Meredith, set fire to his American flag on a streetcorner outside of his apartment. Shortly thereafter, he said to a police officer, "If they let that happen to Meredith, we don't need an American flag." (Id. at 579.) Street was convicted under a New York statute that made it a crime "publicly [to] mutilate, deface, defile, or defy, trample upon, or cast contempt upon [any American flag] either by words or act." (Id. at 578.) "Unable to say with certainty that appellant's words were not an independent cause of his conviction," (id.), the Court concluded that the New York statute impermissibly included verbal expression. The Court declined "to pass upon the validity of [the] conviction insofar as it was sustained * * * on the basis that Street could be punished for his burning of the flag. * * *" (Id at 594.)

In *Spence* v. *Washington,* 418 U.S. 405 (1974), the Supreme Court overturned Spence's conviction for displaying outside his window an upside down American flag to which had had affixed a peace sign made of removable tape. Spence testified that he intended to protest the invasion of Cambodia and the killing of students at Kent State University, which had occurred a few days before his arrest. (Id at 408.)

The State charged Spence with violating its "improper use" statute, which made it a crime to display an American flag with words or figures affixed to or superimposed on it. Holding the statute unconstitutional as applied to Spence, the Court emphasized the particular factual context in which the action had occurred. It noted that the flag involved was Spence's private property and that he did not "permanently disfigure * * * or destroy it." (Id. at 415.) Importantly, the Court concluded that "no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts." (Id.) [7]

There exists, then, strong and significant grounds—particularly based on Justice Blackmun's dissenting opinion in *Smith* v. *Goguen* and the accommodation of that view by the majority in *Texas* v. *Johnson*—to believe that the Court distinguishes between content-based statutes such as the Texas law struck down in *Johnson* and the existing Federal statute, and content-neutral statutes such as

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[7] Mr. Barr cited *Spence* in support of his argument that S. 1338 is unconstitutional. Several witnesses rejected this interpretation of *Spence* , including Dean Stone, who said; "The law invalidated in *Spence* dealt explicitly with the 'exhibition and display' of the American flag. It was thus 'directly related to the suppression of free expression.' That is not the case with [S. 1338], which is much broader than the flag misuse statute invalidated in *Spence* and is not expressly directed at acts of expression." (Answer of Geoffrey Stone to written question (3)(a) from Chairman Biden.) *See also* answer of Laurence H. Tribe to written question (1)(b) from Chairman Biden ("The *Spence* case . . . . is not precedent for striking down [S. 1338].")

S. 1338, which do not single anyone out for prosecution based on the views he or she intended to express.

4. S. 1338 would pass constitutional muster

The significant and substantial differences between S. 1338 and the Texas statute at issue in *Johnson,* the language of the majority opinion itself in *Johnson,* and the opinions of the Court in other flag cases led several constitutional law scholars—"conservative," "moderate" and "liberal"—to conclude, to varying degrees, that S. 1338 would pass constitutional muster.

For example, in a written statement submitted to the committee, Prof. Henry Monaghan of Columbia Law School, one of the leading experts on *stare decisis,* stated:

> *Texas* v. *Johnson* is far too unstable a precedent to permit a confident conclusion that a majority of the Court would reach such a result [striking down all flag destruction statutes]. *Johnson* itself was 5–4, and the minority seems adamant. Thus, the fundamental question is whether the proposed legislation is sufficiently different to detach one or more members of the majority. *As a predictive matter, that seems to me a fair possibility, given both the discriminatory character of the Texas statute and because the majority opinion itself goes out of its way to state that flag desecreation was not immune from all legislative control.* (Written statement of Henry Monaghan, at 5; emphasis added.)

In Dean Stone words: "*Johnson* does not directly control the constitutionality of [S. 1338]. * * * In the end, there are at a minimum reasonable grounds to believe that the Supreme Court would uphold the proposed statute." (Stone testimony, at 188.) This same view was echoed by Professor Dellinger (See e.g., Dellinger testimony, at 18). And as Professors Baldwin and Williamson said in their joint statement:

> The committee has heard several distinguished witnesses argue that the Supreme Court would not approve this statute. We find this difficult to accept because the legislation before this committee is content-neutral, at least on its face, and for at least one of the Justices in the 5–4 majority in *Texas* v. *Johnson,* that might be sufficient to distinguish and validate this statute. (Baldwin-Williamson statement, at 9–10.)

There was strong support from a variety of witnesses, therefore, that S. 1338 would pass constitutional muster.

IV. Vote of the Committee

On September 21, 1989, with a quorum present, by roll call vote, the Committee on the Judiciary approved S. 1338 and ordered the bill favorably reported. The vote was as indicated below:

YEAS	NAYS
Biden	Kennedy
Leahy	Metzenbaum

DeConcini*	Hatch
Heflin	Grassley
Simon	Humphrey
Kohl*	
Thurmond	
Simpson	
Specter*	

*By proxy.

V. Text of S. 1338

[101st Congress, 2d session]

A BILL To amend title 18, United States Code, to protect the physical integrity of the flag of the United States

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Biden-Roth-Cohen Flag Protection Act of 1989".

SEC. 2. AMENDMENT TO TITLE 18.

Subsection (a) of section 700 of title 18, United States Code, is amended to read as follows:

"(a) Whoever knowingly mutilates, defaces, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined not more than $1,000 or imprisoned for not more than one year, or both.".

VI. Section-by-Section Analysis

Section 1 provides that the short title of this Act will be the "Biden-Roth-Cohen Flag Protection Act of 1989."

Section 2 amends 18 U.S.C. 700(a) to provide that it shall be a crime to knowingly mutilate, deface, burn, maintain on the floor or ground, or trample upon any flag of the United States.

VII. Cost Estimate

U.S. Congress,
Congressional Budget Office,
Washington, DC, September 22, 1989.

Hon. Joseph R. Biden, Jr.,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

The Congressional Budget Office has reviewed S. 1338, the Biden-Roth-Cohen Flag Protection Act of 1989, as ordered reported by the Senate Committee on the Judiciary, September 21, 1989.

S. 1338 would amend section 700 of title 18, United States Code, to change the provisions related to desecration of the U.S. flag. CBO estimates that enactment of this bill would result in no cost to the federal government or to state or local governments.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Michael Sieverts, who can be reached at 226–2860.

Sincerely,

ROBERT D. REISCHAUER,
Director.

VIII. REGULATORY IMPACT STATEMENT

Pursuant to paragraph 11(b), rule XXVI of the Standing Rules of the Senate, the committee, after due consideration, concludes that the bill will not have direct regulatory impact.

IX. ADDITIONAL VIEWS OF SENATOR STROM THURMOND

(TO ACCOMPANY MAJORITY REPORT ON S. 1338)

The arguments for and against S. 1338, the Biden-Roth-Cohen Flag Protection Act of 1989 are ably stated in majority and minority views of this report and therefore will not be repeated here.

A thorough record has been established by the Judiciary Committee receiving testimony from many prominent witnesses and statements by committee members during the four hearings held on the physical desecration of the American flag.

There has been sharp disagreement among constitutional scholars as to whether a flag statute, even one that is neutral in its application, would be upheld as constitutional in light of the *Johnson* decision.

It has been my firm belief, based on testimony, questions, and general discussions, that a constitutional amendment is the most sound and prudent course to protect the integrity of the American flag.

During one hearing on this issue before the Judiciary Committee, Assistant Attorney General William P. Barr testified that the President and the Attorney General are convinced that "the only way to ensure protection of the flag is through a constitutional amendment."

Additionally, Judge Robert H. Bork and former Assistant Attorney General Charles J. Cooper also expressed their views that only a constitutional amendment can adequately address the *Johnson* decision.

Because I am strongly supportive of efforts to reverse the *Johnson* decision, I stated my support for S. 1338 and the chairman's attempt to address this issue by statute.

However, my support for S. 1338 should in no way be interpreted as a diminishing view of a constitutional amendment as truly the most effective approach for overturning the *Johnson* decision.

X. MINORITY VIEWS OF SENATOR METZENBAUM

S. 1338 represents an effort to respond to the Supreme Court's decision in *Texas* v. *Johnson,* 109 S. Ct. 2533 (1989). Gregory Johnson had been convicted for burning an American flag in protest at the Republican National Convention in Dallas. The Supreme Court ruled that the first amendment forbids the state of Texas from punishing Johnson under a statute which prohibits treating the flag "in a way that * * * will seriously offend others."

Flag descration is abhorrent. The American flag symbolizes the hard-won rights and liberties which make America great. Johnson's act was detestable, and it richly deserves the scorn of all Americans.

Nevertheless, the Court's decision in the *Johnson* case does not warrant a legislative response. Perhaps the most important right symbolized by the American flag is the right to differ. The Court's decision in Johnson upheld a bedrock principle of the first amendment, which "is that Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas* v. *Johnson,* 109 S. Ct., at 2544.

Past decisions of the Court make clear that that princple applies even to expression which involves the flag. *Smith* v. *Goquen,* 415 U.S. 566 (1974); *Spence* v. *Washington,* 418 U.S. 405 (1974); *Street* v. *New York,* 394 U.S. 576 (1969). The Court has recognized that the first amendment's prohibition against the suppression of dissenting expression, "is not dependent on the particular mode in which one chooses to express an idea." *Texas* v. *Johnson,* 109 S. Ct. at 2546. The prohibition against governmental suppression of expression applies, irrespective of the fact that Johnson chose to communicate his protest by burning the flag. While the Court in Johnson acknowledged that the Government has an interest in protecting the flag, the majority concluded that such an interest does not allow it to "criminally punish a person for burning a flag as a means of political protest." Id. at 2547.

The Court's decision in *Johnson* was a courageous and unpopular one. It illustrates the wisdom of allowing the Supreme Court to be the final arbiter of the Constitution, thereby preventing the sweep of its protection from varying according to the political passions of the day. The Bill of Rights is not designed to protect people or ideas that would win popularity contests. Indeed, the right to free expression is meaningless if that right only protects expression sanctioned by the majority. The depth of a nation's commitment to free speech is measured by its willingness to tolerate expression which most of its people find repellent.

The Court's decision in *Johnson* was grounded in these timeless and enduring principles. Rather than attempt to craft a legislative response to that decision, both the Constitution and the flag would be best served by having Congress do nothing. Legislation to pro-

tect the flag is not necessary. Respect for the flag is not under siege. American values and American security are not being threatened by an outbreak of flag desecration.

Given the absence of any demonstrable need to legislate protection of the flag, we should not be taking action in an area which implicates liberties safeguarded by the Bill of Rights. It is true that since S. 1338 aims to protect the physical integrity of the flag in all circumstances—rather than simply in those instances in which treatment of the flag is offensive or contemptuous—it is more consistent with the first amendment than are statutes whose application turns upon the communicative impact of a flag-burner's conduct. But while S. 1338 may be content-neutral, the bill nevertheless will proscribe expression which has been very wary of taking such action, particularly when there is no compelling need to do so.

To pass constitutional muster, S. 1338 must apply to flag desecration in all instances, regardless of whether it is done in public or private. Thus, the reach of the bill would encompass the private of a paper flag bought from a dime store. Moreover, because S. 1338 fails to adequately define the term "flag," the bill could even be read to forbid the destruction or mutilation of paper napkins, T-shirts, or other objects which feature a representation of the flag. Indeed, inaccurate drawings or renderings of the flag—in a painting, on a paper plate, on a piece of clothing—could themselves constitute "defacing," and thus be punishable under S. 1338.

S. 1338 does not apply to flags which have "become worn, torn or soiled through the normal course of usage and the passage of time," since the government's interest in protecting their "physical integrity no longer applies." Marjority Report at n.2. Because such flags are "no longer a fitting emblem for display, [they] may be disposed by burning or other means." This exemption will permit Veteran's groups to continue to dispose of worn flags by burning them. However, this exemption could provoke endless debate over when a flag has become "worn * * * through the normal course of usage and the passage of time." It is foreseeable that there will be instances in which a defendant's conviction under S. 1338 will turn upon the amorphous concept of whether a flag was sufficiently tattered to have warranted disposal.[1]

In short, S. 1338 is an unnecessary and potentially unworkable statute which will punish conduct which the Court has ruled is protected under the first amendment. Since there is no evidence to suggest flag desecration is a problem in this country, Congress should refrain from enacting legislation which impinges upon liberties protected by the Bill of Rights.

The controversy surrounding the *Johnson* decision illustrates the paradox of living in a country which is both governed by majority rule and fiercely protective of individual liberty. While Gregory Johnson's act was contemptible and contrary to all that Americans hold dear, the Supreme Court's decision in the *Johnson* case was laudable and fully consistent with the Constitution.

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[1] It should be noted that this problem is inherent in any effort to bar flag desecration while preserving the opportunity to dispose of a worn flag by burning it. The same uncertainty regarding how to define a "worn" flag would surface in a statute enacted pursuant to a constitutional amendment empowering Congress to bar flag desecration.

Since the *Johnson* decision, we have not seen an outbreak of flag desecration, but instead a spontaneous outpouring of renewed respect for the flag. To enact legislation to protect the flag betrays a lack of faith in our Constitution and a lack of faith in our people's commitment to the flag. Rather than pass a law, Congress should simply recognize that the flag's safety is most firmly secured by the legions of Americans who quietly, routinely and freely decide to display it every day.

XI. MINORITY VIEWS OF SENATOR ORRIN G. HATCH AND CHARLES E. GRASSLEY

WHY WE SHOULD PROTECT THE FLAG

The American people revere the flag as a unique symbol of our country and of the freedom we enjoy as Americans. It is the one symbol that unites a very diverse people in a way nothing else can. Despite our differences of party, politics, philosophy, religion, ethnic background, economic status, social status, or geographic region, the flag forms a unique, common bond among us.

Justice Stevens, dissenting in *Texas* v. *Johnson,* aptly stated:

> A country's flag is a symbol of more than nationhood and national unity. It also signifies the ideas that characterize the society that has chosen that emblem as well as the special history that has animated the growth and power of those ideas. * * *
>
> [The American flag] * * * is a symbol of freedom, of equal opportunity, of religious tolerance, and of goodwill for other peoples who share our aspirations. * * * Slip op. at 1,2 (Stevens, J. dissenting).

Chief Justice Rehnquist has written,

> The significance of the flag, and the deep emotional feelings it arouses in a large part of our citizenry, cannot be fully expressed in the two dimensions of a lawyer's brief or of a judicial opinion. *Smith* v. *Goguen,* 415 U.S. 566 at 602 (1974) (Rehnquist, J., dissenting).

The Chief Justice then noted:

> . . . if the government may create private proprietary interests in written work and in musical and theatrical performances by virtue of copyright laws, I see no reason why it may not * * * create a similar governmental interest in the flag by prohibiting even those who have purchased the physical object from impairing its physical integrity. For what they have purchased is not merely cloth dyed red, white, and blue, but also the one visible manifestation of two hundred years of nationhood * * * Id. at 602–603.

Justice White has written:

> One need not explain fully a phenomenon to recognize its existence and in this case to concede that the flag is an important symbol of nationhood and unity, created by the Nation and endowed with certain attributes. * * * Id. at 587 (White, J., concurring).

PROTECTING THE FLAG DOES NOT THREATEN THE FIRST AMENDMENT

In our view, it cannot be seriously argued that the protection of the flag from physical desecration impairs the first amendment's principle of freedom of speech. This freedom has never been deemed absolute. Libel is actionable, even under the first amendment. Obscenity is not protected under the first amendment. Nor are "fighting words", designed to provoke violent reactions by an audience, protected. Reasonable time, place and manner limits may be constitutionally placed on speech. Hence, a person cannot blare out his or her political views at two o'clock in the morning in a residential neighborhood and claim first amendment protection.

Protecting the flag from physical desecration does not prevent a single idea or thought from being expressed. It does not interfere with the numerous ways of conveying an idea—through speech, use of placards, leaflets, newspapers, and more. It merely prevents conduct with respect to one object, and one object only, our flag. We can withdraw that one unique object from physical desecration without limiting freedom of speech. Indeed, for many years, a Federal statute and 48 State statutes did protect the flag. Can anyone identify actual harm to the first amendment during this time?

We note that other ardent proponents of the first amendment have expressed similar views. In *Street* v. *New York,* 394 U.S. 576 (1969), the defendant burned a flag while uttering a political protest. The Court overturned his conviction since the defendant might have been convicted solely because of his words. The Court reserved judgment on whether a conviction for flag burning itself could withstand constitutional scrutiny. Id. at 581. Chief Justice Warren dissented:

> I believe that the States and the Federal Government do have the power to protect the flag from acts of desecration and disgrace * * * Id. at 605 (Warren, C.J., dissenting).

Justice Black—generally regarded as a first amendment "absolutist"—also dissented and stated:

> It passes my belief that anything in the Federal Constitution bars a State from making the deliberate burning of the American Flag an offense. Id. at 610 (Black, J., dissenting).

Justice Fortas agreed with Chief Justice Warren and Justice Black:

> [T]he states and the Federal Government have the power to protect the flag from acts of desecration committed in public. * * * [T]he flag is a special kind of personality. Its use is traditionally and universally subject to special rules and regulation. * * * A person may "own" a flag, but ownership is subject to special burdens and responsibilities. A flag may be property, in a sense; but it is property burdened with peculiar obligations and restrictions. Certainly * * * these special conditions are not per se arbitrary or beyond governmental power under our Constitution. Id. at 615–617 (Fortas, J., dissenting).

Moreover, there is no slippery slope here—because there is simply nothing else like our flag. We are seeking no protection for any other symbol.

A STATUTORY RESPONSE TO "TEXAS V. JOHNSON" IS INADEQUATE

We have concluded that a constitutional amendment is absolutely necessary to ensure with certainty the validity of any statute banning flag desecration. We believe it is futile to try to overturn this Supreme Court interpretation of the Constitution by a statute. The Constitution provides, in article V, for the exclusive means of its amendment. The article V amendment process is an organic, fundamental part of the Constitution and should not be evaded.

We believe that a facially neutral statute, such as S. 1338, which bans all knowing mutilation, defacement, trampling, or burning of the flag undertaken for any purpose, including for the purpose of ceremoniously disposing of a worn or dirty flag, is unlikely to survive constitutional scrutiny.

Even such a facially neutral statute will be struck down when applied to a person who desecrates the flag as part of a political expression, after *Texas* v. *Johnson*. Why? Because the Supreme Court declared in that case that the Government's asserted interest in preserving the flag as a symbol of nationhood and national unity is insufficient to overcome a person's so-called right to burn the flag as part of expressive conduct. Indeed, it cannot be denied that the principal if not the only purpose in enacting a facially neutral statute is to prohibit expressive conduct that physically desecrates the flag.[1] No one claims that we are interested in protecting the material, the thread, and the dye in the flag. We protect the flag as a symbol, including against those who would desecrate the flag as part of a political expression. Because this is the clear purpose of the statutory approach, that approach will fall after *Texas* v. *Johnson*.

As William Barr, Assistant Attorney General for Legal Counsel, testified, "it cannot be seriously maintained that a statute aimed at protecting the Flag would be constitutional." The unconstitutionality of any statute which attempts to protect all forms of flag destruction has been predicted by Justice Brennan, who wrote that any statute "that simply outlawed any public burning or mutilation of the Flag, regardless of the expressive intent or nonintent of the actor," would be "invalid for the reasons stated in my discussion of *Spence* [v. *Washington*, 418 U.S. 405 (1974)]." *Kime* v. *United*

[1] The argument of the committee that S. 1338 is constitutionally sound because phrased in neutral language that does not affect free speech is misplaced. Irrespective of the language chosen, the principal purpose of this bill, like the pending constitutional amendment, is to change the result of the *Johnson* case. The Supreme Court frequently examines the legislative history of a statute. *See, e.g., Wallace* v. *Jaffree*, 472 U.S.C. 38 (1985). The legislative history of this law, if it is enacted, will reveal overwhelming evidence that it was designed to prevent the expression of an idea through flag desecration—that is an unconstitutional purpose under the *Johnson* decision. Indeed, Justice Brennan has written that:

> [T]he only basis for a governmental interest (if any) in protecting the flag is precisely the fact that the flag has substantive meaning as a political symbol. Thus, assuming that there is a legitimate interest at stake, it can hardly be said to be one divorced from political expression. *Kime* v. *United States*, 459 U.S. 949, 953 (1982) (Brennan, J., dissenting).

States, 459 U.S. 949, 955 n.7 (1982) (Brennan, J., dissenting) (emphasis in original).[2]

Moreover, we do not believe a neutral, blanket statute reaching all physical desecration of the flag, such as S. 1338, is appropriate even if it held constitutional. We think a blanket statute sweeps too far. There are ligitimate reasons to dispose of worn or dirty flags in a way that would run afoul of such a statute. Under this statute, a veteran or any other American who reverently wishes to dispose of a worn or dirty flag by burning it would be subject to a $1,000 fine or 1 year imprisonment or both.[3] Yet, any exception we write into a statute further undermines its constitutionality under *Texas* v. *Johnson.* The Court there noted that if a State were to forbid

> flag-burning wherever it is likely to endanger the flag's symbolic role, but allow it wherever burning a flag promotes that role—as where, for example, a person ceremoniously burns a dirty flag—we would be saying that when it comes to impairing the flag's physical integrity, the flag itself may be used as a symbol—as a substitute for the written or spoken word * * *—only in one direction. Slip opinion at 19.

This, the Court indicated, is impermissible.[4] While the Court did not make this remark in the context of an otherwise blanket ban on flag desecration, we are deeply concerned that such a rationale would be used to invalidate just such a blanket statute.

Indeed, this constitutional flaw is present in H.R. 2978, the House-passed flag statute, which is also pending in the Senate. Its ban on flag desecration includes an exception for "any conduct consisting of the disposal of a flag when it has become worn or soiled."

Further, S. 1338 and H.R. 2978 reach private conduct, such as that undertaken in the home. It is the public casting of contempt on the flag, however, whether to make a political point or no point at all, which we believe should be outlawed. Thus, the present Federal statute is the appropriate approach to outlawing flag burning:

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[2] The committee suggests that *Texas* v. *Johnson* does not govern the case of a conviction for flag burning undertaken in violation of a law banning any person from making an open fire in a public place because such a ban is content-neutral. Report, page 9, footnote 5. The committee suggests that, similarly, the constitutionality of a content-neutral flag protection statute is not governed by *Texas* v. *Johnson.* Report, page 9, text at note 5. We believe the analogy, however, is irrelevant. The constitutionality of the former prohibition does not tell us much, if anything, about the constitutionality of the latter prohibition. S. 1338, is not a national prohibition on making an open fire in a public place; it is a prohibition of all specified conduct with respect to the flag alone, in order to preserve its role as a national symbol.

[3] Apparently recognizing the unsoundness of such a result, the committee seeks to avoid this plain meaning of S. 1338 in a footnote in its report. Report, page 4, footnote 2. The majority suggests that disposal of a worn or soiled flag by burning it is not prohibited by S. 1338 because "[s]uch a flag is no longer a fitting emblem for display" and the Government's "interest in protecting its physical integrity no longer applies." This interpretive gloss clashes directly with the language of S. 1338. S. 1338 punishes the knowing mutilation, defacement, burning, maintaining on the ground, or trampling of the flag—without more. It establishes no exception for "a flag [which] is no longer a fitting emblem for display." The forthright way of excluding disposal of a worn or soiled flag from the strictures of the statute is to include a provision to that effect in the statute itself. Indeed, H.R. 2978, the House-passed flag statute, contains such a provision. Moreover, the definition of the term "flag of the United States" contained in the statute amended by S. 1338 does not turn on whether the flag is "a fitting emblem for display." 18 U.S.C. section 700(b).

[4] Ironically, if the committee's strained interpretation that S. 1338 somehow contains a similar, implicit exception is accepted by the courts, it, too, would lose even the veneer of content-neutrality.

> Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined not more than $1000 or imprisoned for not more than one year, or both. 18 U.S.C. Section 700(a).

Accordingly, we have no need of passing a new federal statute, but only to assure the constitutionality of the current one, which has been on the books for over 20 years.

A constitutional amendment is the safest, surest, and most permanent way of achieving the protection of the flag that the supporters of a statute-only approach also claim they favor.[5] It is difficult to square their opposition to an amendment on their asserted grounds that it somehow tampers with the first amendment with their own statutory approach: how is a statute which prohibits flag desecration in all or some instances not a threat to first amendment principles, while a constitutional amendment achieving the same thing *is* such a threat? Indeed, S. 1338 and H.R. 2978 ban more conduct than the Federal statute now on the books, 18 U.S.C. 700. As mentioned earlier, the current Federal law bans mutilation, burning, and so forth, of the flag, *in public,* and when done *knowingly to cast contempt* on the flag. S. 1338 and H.R. 2978 prohibit *all* knowing mutilation and burning and so on, *whether contemptuous or not, and whether in public or in private.* The one exception is in H.R. 2978, for conduct disposing of a worn or dirty flag.

We note that the Federal statute has not yet been struck down by the Court. Of course, it is not presently enforceable. If we enact a constitutional amendment, this statute will already be on the books. Thus, there will be no gap in protection of the flag between the effective date of an amendment and the enactment of a new statute. Neither S. 1338 nor H.R. 2978 are needed; what is needed is a constitutional amendment legitimizing the statute we now have.

We also raise other serious concerns about H.R. 2978. It creates expedited review in the Supreme Court:

> If the question of the constitutionality [of the statute] is properly presented in any case in [federal] District Court, the court shall, if the Supreme Court . . . has not previ-

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[5] The committee, in defending the constitutionality of S. 1338, seeks to divine the likely vote of Justice Blackmun. Some commentators believe Justice Blackmun, who voted in the *Texas* v. *Johnson* majority, will vote to uphold a blanket ban on all flag desecration. This prediction is based on his dissent in *Smith* v. *Goguen,* 415 U.S. 566 (1974). There, the Supreme Court voided the arrest of a person convicted under a Massachusetts law which banned the public mutilation or contemptuous treatment of the flag. The person in question had a version of the flag sewn to the seat of his pants. The Court ruled the person was denied due process because the law was too vague in the use of the phrase "treats contemptuously." The *Smith* v. *Goguen* case did not involve flag abuse which was part of expressive conduct—the Court noted that there was no indication the contemptuous treatment of the flag was part of a political demonstration.

In his dissent, Justice Blackmun stressed that he believed the State court had "limited the scope of the statute to protecting the physical integrity of the flag." 415 U.S. at 591. He believed the respondent had been punished "for harming the physical integrity of the flag by wearing it affixed to the seat of his pants." Id. But he also made clear that he accepted the state court's determination that the respondent's "punishment was not for speech—a communicative element." At best, we think Justice Blackmun's vote on the constitutionality of a blanket flag statute applied in a case where the desecration was part of a political expression is doubtful.

> ously ruled on that question, immediately certify that question to the Supreme Court.

We question whether we should provide this kind of expedited mechanism. The committee heard no testimony on it. What does "properly presented" mean? When the issue is pled? Before or after discovery is completed? What kind of "binding instructions" are we talking about authorizing the Supreme Court to give?

And why does H.R. 2978 give the two Houses a right to intervene as a party to defend the constitutionality of the bill? That task is for the executive branch. We believer we ought to think long and hard before we grant Congress the right to intervene as a party, even for limited purposes, in cases involving legislation we enact. Certainly the committee has not reviewed this in the detail it merits. Thus, we find the House bill even less acceptable than S. 1338.

S.J. Res. 180 Is a Suitable Response

S.J. Res. 180 provides for the following amendment to the Constitution: "The Congress shall have power to prohibit the physical desecreation of the Flag of the United States." We believe adoption of this amendment fulfills its intent to overturn the *Texas* v. *Johnson* decision and restore the power to Congress and the States to prohibit flag desecration which we believe they always had. In *Johnson,* the Court said it could not pick and choose which symbols were so unique as to warrant protection:

> There is, moreover, no indication—either in the text of the Constitution or in our cases interpreting it—that a separate juridical category exists for the American Flag alone.

This amendment establishes just such a category in the Constitution's text.

There was a brief criticism in the committee debate that this amendment would give Congress and the States the power to outlaw the use of the flag at political conventions, parades, or outlaw ownership of the flag by members of the Communist Party or Socialist Party. This criticism, however, finds no basis in the language of the amendment or the intentions of its sponsors. S.J. Res. 180 creates no slippery slope down which any democratic guarantee will slide. Rather, it merely authorizes States and Congress to prohibit the *"physical desecration"* of the flag (emphasis supplied). There is no plausible way of reading this term to include prohibiting the mere display or carrying of the flag at any gathering, including political conventions and parades. Nor can the language possibly be read to authorize prohibiting ownership or display of a flag by any individual or member of any group. This concern was not raised by a single witness, including the most severe critics of an amendment, testifying at the four hearings held on this matter.

We believe, in fact, it is likely that the overwhelming majority of states will leave their current laws in place if this amendment is enacted.

In sum, we believe an amendment is the only constitutionally sound approach to restore the power of Congress and the States to protect the flag from desecration.

ORRIN G. HATCH.
CHUCK GRASSLEY.

XII. MINORITY VIEWS OF SENATOR HUMPHREY ON S. 1338

I voted against S. 1338, the statute proposed in response to the Supreme Court's ruling in *Texas* v. *Johnson*, because I agree with those legal authorities who contend that the statute cannot withstand constitutional scrutiny under the reasoning of the *Johnson* decision. While I fully share the disgust felt by most Americans toward those who abuse our flag, I believe that enactment of this statute would be a futile and ineffective gesture.

As Judge Robert Bork stated in his testimony before the committee:

> If Chief Justice John Marshall's 1803 decision in *Marbury* v. *Madison* means anything, it means you may not overturn a decision like this by statute.

As Judge Bork further explained, and as is clear from the controversy surrounding this matter, the motivation of S. 1338 is unquestionably to reverse the result in cases like *Texas* v. *Johnson*. Although the Committee Report goes to great lengths to disavow any intent to limit the communicative aspect of flag desecration, the fact is that that result is inescapable under a statute of this kind. As stated in the testimony of Assistant Attorney General William Barr:

> Because the Government's reason for protecting the flag is necessarily related to expression, the prohibition would always be subjected to exacting scrutiny, and therefore would never prevail over an individual's First Amendment interest in expressive conduct.

The *Johnson* decision made in clear that the Supreme Court considers flag-burning and similar abuse of the flag for expressive purposes to be protected by the first amendment. Since S. 1338 would clearly prohibit conduct which the Supreme Court has held is protected by the first amendment, I can only conclude that it would likely be held unconstitutional.

XIII. Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets; new matter is printed in italic; existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

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TITLE 18—CRIMES AND CRIMINAL PROCEDURE

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CHAPTER 33—EMBLEMS, INSIGNIA AND NAMES

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§ 700. Protecting the physical integrity of the flag of the United States.

[(a) Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating defacing, defiling, burning, or trampling upon it shall be fined not more than $1,000 or imprisoned for not more than one year, or both.]

(a) Whoever knowingly mutilates, defaces, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

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